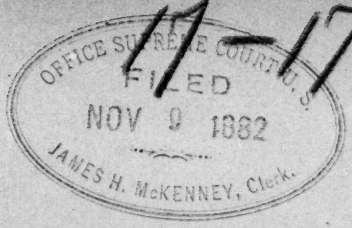

11-174

SUPREME COURT OF THE UNITED STATES.

No. 82.

WALLACE S. JONES AND NOBLE JONES, EXECUTORS OF GEORGE NOBLE JONES, DECEASED; WILLIAM H. HARRISON, EXECUTOR OF MARY G. HARRISON, DECEASED; ANNE M. CUTHBERT, WIDOW, AND ALFRED CUTHBERT, JR., AND MARY C. CUTHBERT, CHILDREN AND HEIRS AT LAW OF ALFRED CUTHBERT, DECEASED, AND WILLIAM A. RITCHIE, APPELLANTS,

vs.

WILLIAM N. HABERSHAM AND WILLIAM HUNTER, EXECUTORS OF MARY TELFAIR, DECEASED; THE TRUSTEES OF THE INDEPENDENT PRESBYTERIAN CHURCH OF SAVANNAH, THE UNION SOCIETY OF SAVANNAH, THE WIDOWS' SOCIETY OF SAVANNAH, THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA, THE GEORGIA HISTORICAL SOCIETY, AND MRS. VIRGINIA GOULD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF SOLICITORS FOR APPELLEES.

IN THE SUPREME COURT OF THE UNITED STATES.

WALLACE S. JONES and NOBLE JONES, Executors of GEORGE NOBLE JONES, deceased; WILLIAM H. HARRISON, Executor of MARY G. HARRISON, deceased; ANNE M. CUTHBERT, Widow, and ALFRED CUTHBERT, Jr., and MARY C. CUTHBERT, children and heirs-at-law of ALFRED CUTHBERT, deceased, and WILLIAM A. RITCHIE,

Appellants,

vs.

WILLIAM N. HABERSHAM and WILLIAM HUNTER, Executors of MARY TELFAIR, deceeased; THE TRUSTEES OF THE INDEPENDENT PRESBYTERIAN CHURCH OF SAVANNAH; THE UNION SOCIETY OF SAVANNAH; THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA; THE GEORGIA HISTORICAL SOCIETY, and MRS. VIRGINIA GOULD.

No. 82.—Appeal from the Circuit Court of the United States for the Southern District of Georgia.

BRIEF OF SOLICITORS FOR APPELLEES.

Mary Telfair died in the month of June, 1875, leaving a Will by which she disposed of her entire estate. She was a maiden lady, and her nearest relatives were the great-grand-children of a brother, the grand-children of a paternal uncle and the grand-children of a maternal aunt. The probate of the Will was resisted by representatives of each class of relatives. The result was that the Will has been established as the last Will and Testament of Miss Telfair, and it has been duly admitted to probate, as such, in solemn form.

See the cases of

Wetter, Guardian, *et al.*, *vs.* Habersham *et al.*, 60 Georgia Reports, 193.

Jones *et al.*, *vs.* Habersham *et al.*, 60 Georgia Reports, 203.

Jones *et al.*, *vs.* Habersham *et al.*, 63 Georgia Reports, 146.

The object of the Complainants' Bill is to have certain of the legacies and devises in Miss Telfair's Will adjudged inoperative and void, and a resulting trust therein declared in favor of the heirs at law of the testatrix.

Transcript of Record, page 6.

I.

The objects of these legacies and devises are charities, and the question is, are they valid under the laws of Georgia? If they are, they will be enforced, although the Circuit Court of the United States may not possess all the chancery powers exercised by the State Courts.

Loring *et al. vs.* Marsh *et al.*, 2 Clifford C. C., 492.
Loring *et al. vs.* Marsh *et al.*, 6 Wallace, 337.

"The following subjects are proper matters of charity for the jurisdiction of equity:

1. The relief of aged, impotent, diseased or poor people.
2. Every educational purpose.
3. Provisions for religious instruction or worship.
4. For the construction or repair of public works or highways, or other public conveniences.
5. The promotion of any craft or persons engaging therein.
6. For the redemption or relief of prisoners or captives.
7. For the improvement or repair of burying grounds or tombstones.
8. Other similar subjects, having for their object the relief of human suffering or the promotion of human civilization."

Code of Georgia (Edition of 1873) § 3157.

"A devise or bequest to a charitable use will be sustained and carried out in this State, and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done, fails from any cause, a Court of Chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator."

Code of Georgia (1873), § 2,468.

"Equity has jurisdiction to carry into effect the charitable bequest of a testator or founder or donor, where the same are definite and specific in their objects and capable of being executed."

Code of Georgia (1873), § 3,155.

"*Cy près:* If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the Court may by approximation give effect in a manner next most consonant with the specific mode prescribed."

Code of Georgia (1873), § 3,156.

"*Extraneous evidence:* If the terms of the bequest or deed are obscure, doubtful or equivocal, other evidence may be looked to ascertain the sense in which particular expressions are used, but not to make definite that which in itself is too indefinite for execution."

Code of Georgia (1873), § 3,160.

"*Want of Trustee:* A trust shall never fail for the want of a trustee."

Code of Georgia (1873), § 3,195.

The foregoing sections of the Code—the Statute law of Georgia—have been construed together by the Supreme Court of that State in the case of Newsome v. Starke et al., 46 Georgia Reports, p. 88.

In the above case the law of Georgia upon charitable bequests is fully discussed; and being the unanimous decision of the Supreme Court, the law there fixed was the guide to the testatrix.

The following rules were established by that decision:

The words "definite and specific," as used in the Code, mean such bequests and devises as by the usual practice in Chancery Courts are held to be "definite and specific."

Ibid, p. 95.

"If the bequest be to charity generally, or to religion and education generally, the jurisdiction was not in the Court, as such, to carry into effect; but if the objects of the gift were stated, though only generally, or if there were a trustee appointed, the Court would supply the want of definiteness in the object, or would compel the trustee to carry out the general intent of the testator."

Ibid, p. 95.

The following are cited, in said case, as bequests which have been held not to be too indefinite:

A gift "to the poor;" to a "particular parish or place;" to the "widows or orphans of a parish;" to a "Church, to be laid out in bread for the poor."

"If the general objects were pointed out, or if the testator had fixed any means for doing so, as by the appointment of trustees for such purpose, Courts of Chancery treated the bequest as one sufficiently definite and specific for judicial cognizance, and carried it into effect, notwithstanding there might remain some indefiniteness and uncertainty."

Ibid, p. 95.

If there should be no trustee, or if the trustee should fail, the Court has power to appoint a Master to devise a scheme for carrying the bequest into effect.

Ibid, pp. 95 and 96.

This case overruled Beall *vs.* Drane, 25 Georgia Reports, 430, and affirmed Beall *vs.* Fox, 4 Georgia Reports, 404.

In the last named case the principles of the Statute of 43 Elizabeth, chap. 4, concerning charitable uses, were declared of force in Georgia.

It was decided in the same case that the mortmain acts of Great Britian, particularly the Statute of 9 George II., chap. 36, were not of force in Georgia.

The only restriction upon the right of a testator to devise his property to charity is contained in the Georgia Code (Edit. 1873), § 2419: (Edit. of 1868, § 2384), "*Charitable Devises.* No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational or civil institution to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void."

This Statute has no application whatever to the case at bar: Miss Telfair left neither child nor descendants of a child, and had never been married. The words, "And in all cases the will containing such devise shall be executed at least ninety days before the death of the testator," etc., have been construed to mean all cases where the testator left a wife, child or descendant of child, and not to apply to any other case.

Reynolds *vs.* Bristow, 37 Georgia Reports, 283.

It was only necessary that Miss Telfair, in giving expression to her wishes, should comply with the laws of Georgia. And those laws, applicable to this case, may be reduced to the following general principles:

1. The objects of the charity should be "definite and specific," according to the meaning of those words in the usual practice of Chancery Courts. For instance, "to the poor;" "to a particular parish or place;" "to the widows or orphans of a parish;" "to a church, to be laid out in bread for the poor."

2. If the objects should not be thus "definite and specific," the devise must be to a trustee, upon whose judgment the testator will be supposed to have relied to supply any want of definiteness.

3. If no trustee be appointed, when the objects are definite and specific as aforesaid; *or* if a trustee be appointed and the want of definiteness in that way be supplied, and the trustee should fail, or need judicial aid, the Court will appoint a trustee or a master to devise a proper scheme for carrying the bequest into effect, and more particularly is this true when a bequest is to a trustee *and his successors*.

If these principles are applied to the devises in this Will they will be found valid.

II.

ITEM TENTH.

The tenth item contains a devise to the Trustees of the Independent Presbyterian Church of Savannah of a lot of land and improvements in said city, to have and to hold the same upon the following terms and conditions, viz.:

First.—That the Trustees shall appropriate annually out of the rents of the property the sum of One Thousand Dollars "to one or more Presbyterian or Congregational Churches in the State of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State."

Second.—That the Trustees nor any other officer of the Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice, nor shall they sell or alien the lot on which the Sunday School room of said church now stands.

Third.—That the Trustees will keep in good order and have thoroughly cleaned up every spring and autumn Testatrix's cemetery lot; and that no burial of any person shall ever take place within the lot. Testatrix, by the same item, gave said cemetery lot to the Trustees for the purpose of having the same protected and cared for.

See Transcript of Record, pp. 8 and 9.

The assignments of error referring especially to this devise are the second and third, under which it will be urged that the provision in this item for aid to be given to one or more Presbyterian or Congregational Churches in the State of Georgia, is too uncertain, (2d assignment of error), and that the Independent Presbyterian Church cannot under its charter execute the trusts imposed by this and the other provisions of said item (3d assignment of error).

The objection of uncertainty cannot prevail; gifts to such individuals of a certain class as may be selected by a person or corporation named by the donor, have always been held sufficiently definite and certain, *e. g.*, "to twenty aged widows and spinsters of a parish," "to such poor housekeepers as A should appoint," "to ten worthy men for the purchase of meat and wine," etc.

Perry on Trusts, vol. 2, § 699.

"To the poor;" "to the widows and orphans of a parish;" "to a church to be laid out in bread for the poor."

Newsome *vs.* Stark, 46 Ga., 95.

In the case last cited the bequest was, "to pay for the education of poor children belonging to the county."

Ibid.

The provision for the poor and needy churches "so as to promote the cause of religion," is certainly for a charitable use; it is a "provision for religious instruction or worship."

Georgia Code, § 3157, par. 3.
2 Perry on Trusts, § 701.

The devise of the cemetery lot for the purposes stated is valid under § 3157, par. 7 of the Georgia Code; it is "for the improvement or repair of burying grounds."

The corporation can certainly execute the trusts. The gift is made directly to the corporation, which may receive it under its charter and the general laws of Georgia. The Code of Georgia empowers all corporations "to receive donations by gift or will, to purchase and hold such property, real or personal, as is necessary to the purpose of their organization" (§ 1679), and authorizes religious and charitable societies "to receive by purchase, gift or bequest all property both real and personal." (§ 2347.)

The Charter authorizes the Trustees to receive "all manner of property, real and personal."

See Charter, *post*, p. 18.

Even if the trusts were not germane to the purposes of the corporation—and they are—still it could execute them, because they are coupled with a gift for the benefit of the Church. "When property is given to a corporation partly for its own use and partly

for the use of another, the power of the corporation to take and hold for its own, use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others."

1 Perry on Trusts, § 44.
In the matter of Howe, 1 Paige, Ch. 214.

III.

THE ELEVENTH ITEM.

By this item a lot of land in the City of Savannah, with the improvements thereon, is given to the Union Society of Savannah. Annexed to this devise is a condition that said lot and improvements shall not be sold, but held for the support of the school and charities of said institution without being at any time liable for the debts of said society.

The assignments of error printed in the record raise no question about this devise, except as to the condition thereof, which will be considered hereafter.

The gift is made to the corporation, which may receive it under the law of Georgia, applicable to all such institutions (see Code, §§ 1679 and 2347 cited *ante*, p. 5) and under its charter (see charter of Union Society, *post*, p. 20.)

IV.

THE TWELFTH ITEM

Gives a lot of land in Savannah, with improvements, to the Widows' Society of Savannah, "for the benevolent purposes of said Society," upon the condition that the Society shall not sell the property, nor hold the same subject to its debts, contracts or liabilities.

The sixth assignment of error raises the question whether this is a gift for charitable purposes. The appellants contend that the expression "for the benevolent purposes of said Society," shows that this is not a charity. Now, it may be true that all benevolent purposes are not necessarily charitable; but it is equally true that all charitable purposes are benevolent. A gift to "benevolent purposes" might be too indefinite to be executed. But if any words were added which showed the nature of the gift to be charitable, Courts of Equity always sustain it.

Att'y. Gen'l *vs.* Comber, 2 Sim & Stu., 93.
Saltonstall *et al. vs.* Sanders *et al.*, 11 Allen 465-6.
Miller *vs.* Rowan, 5 Cl. & Fin. 99.

A bequest to trustees, to be applied and disposed of "for such charitable and benevolent purposes" as one of them should direct and think proper, has been sustained.

Jemmit *vs.* Verril, Amb. 585, note.

If reference is made to the charter of this corporation "the benevolent purposes of said society" will be seen to be charitable,

beyond all question. It was incorporated "for the relief of indigent Widows and Orphans."

(See Charter *post*, p. 19.)

This is clearly a charitable purpose.

See Code, § 3157, par. 1, cited *ante*, p. 2.

This corporation is authorized to receive the bequest under the general law relating to such corporations, (see *ante*, p. 5), and also under its charter. (See *post*, p. 19.)

V.

CONDITIONS.

The conditions against alienation in each of the tenth, eleventh and twelfth items, does not render the devises void.

Perrin *vs.* Cary, 24 How., 465.
Stanley *vs.* Colt, 5 Wall., 119.
McDonough *vs.* Murdock, 15 How., 411.
Ould *vs.* Foundling Hospital, 5 Otto, 303.
Wilcoxon *et al.*, *vs.* Harrison, 32 Ga., 480.
Church in Brattle Square *vs.* Grant, 3 Gray, 142.

The conditions are not illegal, immoral or impossible, and therefore do not invalidate the devise. But if they are of that character the conditions are void and the devises stand.

Code of Georgia, (1873), § 2661.—"*Void Conditions*: Impossible, illegal or immoral conditions are void, and do not invalidate a perfect gift."

Code of Georgia, (1873), § 2296.—"*Repugnant Conditions*: A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law."

This very point in principle was made in the case of the Executors of McDonough *vs.* Murdock *et al.* by the heirs at law and was decided against them, the statute law of Louisiana being almost in the above language of the Code of Georgia.

15 How., 410, 411 and 412.

Conditions which are repugnant to the legal rights which the law attaches to ownership, the common law pronounces void and the civil law treats as recommendation and counsel not designed to control the will of the donee.

15 How., 412.

"Subsequent conditions are not favored because they serve to defeat estates."

These conditions are good whenever they are not impossible to be performed at the time, or made so afterwards by the act of God or the grantor, when they are not contrary to law nor repugnant to the deed itself. In all such cases the conditions themselves are void and the donee takes an absolute estate at once.

Taylor *vs.* Sutton, 15 Ga., 109.

VI.

THIRTEENTH ITEM.

But even if the conditions contained in said tenth, eleventh and twelfth items should be held to defeat the devise, still there would be no resulting trust in favor of the heirs at law, for the reason that the thirteenth item provides that for breach of conditions, the Executors are directed to enter, dispossess the original legatee and the estate is given to the Savannah Female Orphan Asylum. Where property was given to one charity to go over to another in a certain event, it was allowed to go over to the second charity after the lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in the other.

2 Perry on Trusts, § 736, p. 359.
Christ's Hospital *vs.* Granger 37 Eng. Chanc. 100.

VIII.

THE FOURTEENTH ITEM.

"I hereby give, devise and bequeath to the Georgia Historical Society and its successors all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James Square, in the city of Savannah, and running back to Jefferson street, know in the plan of said city as lot letter "N," Heathcote Ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary and works of art, or having relation to art and science, and all the furniture of every description in the dwelling house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate and linen) and all fixtures and attachments to the same, to have and to hold the said lot and improvements, books, pictures, statuary, furniture and fixtures to the said Georgia Historical Society and its successors, in special trust, to keep and preserve the same as a public edifice, for a Library and Academy of Arts and Sciences in which the books and works of art herein bequeathed, and such others as may be purchased out of the income, rents, and profits of the bequest hereinafter made for that purpose shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed, and kept over and against the front porch, or entrance of the main building, on said lot, a marble slab or tablet, on which shall be cut or engraved the following words, to-wit:

TELFAIR

ACADEMY OF ARTS AND SCIENCES,

the word "Telfair" being in larger letters and occupying a separate line above the other words; and on the further condition that no part of the buildings shall ever be occupied as a private residence or rented out for money, and none but a janitor and

such other persons as may be employed to manage and take care of the premises shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings, or exhibitions, or for eating, drinking or smoking, and that no part of the lot or improvements shall ever be sold, alienated or encumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to as far as practicable. For the purpose of providing more effectually for the accomplishment of the objects contemplated in this item or clause of my Will, I hereby give, devise and bequeath to the Georgia Historical Society, and its successors, One Thousand Shares of the capital stock of the Augusta and Savannah Rail Road of the State of Georgia, in special trust, to apply the dividends, income, rents and profits arising from the same to the repairs and maintainance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest."

The appellants assign as error the decision of the Court that the Georgia Historical Society could, under its charter, execute the trust conferred by this Fourteenth Item.

The object here is clearly a charity.

2 Perry on Trusts, § 700.
Code of Georgia (1873) § 3157, par. 2 and 8 (cited p. 2.)

A corporation may be a trustee to carry out a charitable bequest.

Vidal *vs.* Ex'trs Girard Will, 2 How., 188.
Perrin *et al. vs.* Carey, 24 Howard, 367.

Unless prohibited by Charter.

American Colonization Society *vs.* Gartrell, 23 Georgia, 454-5.

The Georgia Historical Society was incorporated by act of Legislature of the State of Georgia, assented to December 19th, 1839, (See Charter *post* p. 21.) The preamble of the Charter recites that the Society was instituted for purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular, and of American history in general. These purposes are educational and for the promotion of human civilization, which are proper subjects of charity.

Georgia Code (1873) § 3157, par. 2 and 8, cited *ante* p. 2.
2 Perry on Trusts, § 700, 704.

Two provisos were annexed to the charter of the corporation, viz: that its clear annual income should not exceed $5,000, and that the funds of the corporation should be used and appropriated to the purposes stated in the preamble, and those only. As the corporation will not enjoy any beneficial interest in this legacy, but

only hold as trustee, it would seem that these provisos do not touch the question even if they were still a part of the charter. But they were repealed in 1870.

See amendment to the Charter, *post* p. 22.

It is contended by appellants that the Legislature had no power to pass this amendment, because the Georgia Constitutions of 1868 and 1877 provided that the General Assembly should have no power "to grant corporate powers and privileges to any private companies except certain classes therein named, not including religious and literary societies, but that it should prescribe by law the manner in which such powers should be exercised by the Courts" (Georgia Code, § 5068).

The words "to grant corporate powers and privileges" clearly mean "to incorporate." If the Legislature had not the power in 1870 to incorporate a literary society, it still had the power to repeal its charter in whole or in part, or to amend it. The Constitution nowhere takes this power away from the General Assembly. Until 1876 the Superior Courts had power only to *create* corporations.

Georgia Code, § 1676.

If the Georgia Historical Society was, in 1875, prohibited from having an annual income of more than $5,000, and if the bequest made in the fourteenth item would increase its income beyond that limit, still the Complainants can derive no benefit from that; the State of Georgia only can interfere.

Perry on Trusts, § 45.
Vidal *et al.*, *vs.* Girard's Executors, 2 How., 127.
Wade *vs.* Colonization Society, 15 Miss., 663.

The title would remain in the corporation until divested by the act of the State.

Runyan *vs.* The Lessee of Coster *et al.*, 14 Pet., 131.

The trusts are germane to the powers and purposes of the corporation: they relate to matters which will promote and aid the general purposes of the corporation, viz.: the education of the people and the promotion of human civilization; the corporation may therefore act as trustee.

1 Perry on Trusts, § 43, page 32.

Indeed it would seem that the trusts are clearly within the scope of the particular purposes of the institution: the corporation may purchase with the income of the one thousand shares of stock bequeathed by this item "works of art and science" of an historical nature or interest, and so promote the particular ends for which it was organized.

If the trusts were not germane to the powers and purposes of the corporation. the corporation could not be compelled to act, but the devise would not fail.

"A trust shall never fail for want of a trustee."

Georgia Code (1873) § 3195.

"The relief granted in cases of trust will always be so moulded

and framed as to render the trust effectual, and secure the best interests of all parties."

Georgia Code (1873) § 3197.
Vidal *vs.* Ex'trs of Girard, 2 How., 188.

"The trust, if otherwise valid, is not for that reason void, and the Court will appoint a competent trustee, and direct a conveyance of the property to him."

1 Perry on Trusts, § 45.

The devise is to the Georgia Historical Society AND ITS SUCCESSORS. The use of the word "successors" is significant. It is to be presumed that the testatrix anticipated there might be a substitute for her first choice.

2 Perry on Trusts, §721.

The conditions attached to this devise are mere details, which are to be treated as recommendations, but which do not invalidate the gift.

See cases already cited on conditions *ante* p. 7.

These conditions are so much in detail, and the charitable intention of the testatrix is so plain, that a Court of Chancery could, with the aid of a master—if that is necessary—carry the bequest into effect.

46 Ga., 96.

IX.

ITEM TWENTY-FIRST.

This item is as follows: "All the rest and residue of my estate, of whatever the same may consist, real, personal and mixed, and wherever situated, I hereby give, devise and bequeath to my executors, hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the City of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents and profits of such portion of the residuum of my estate as may not be expended in the building, erection and furnishing said hospital shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the City of Savannah, and capable of enlargement if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as the first trustees, managers or directresses of said hospital Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West and Eliza Chisholm, all of Savannah, Georgia, and do request and instruct my executors to

advise and consult with the ladies named as to the construction, arrangement and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the State of Georgia as may have jurisdiction in the premises, to be called and known as the "Telfair Hospital for Females," with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them, as the first trustees, managers or directresses, under said act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all or any portion of the real estate or any interest in the same, which I may have or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and as to whether and at what time such sales shall be made."

The ninth assignment of error raises the questions whether this bequest is not too uncertain and too remote as to the time when it shall take effect to be valid.

The bequest is made directly to the Executors, who are made, *pro hac vice*, trustees. In addition to the authorities already cited, attention is asked to the following authorities, which show that the gift is certain and its execution not too remote:

Ould *vs.* Washington Hospital, 5 Otto, 303.
Inglis *vs.* Sailors' Snug Harbor, 3 Pet., 113.
Att'y Gen'l *vs.* Downing, Amb., 550.

The power to grant the charter referred to in this item rests in the Legislature of the State of Georgia, or it may confer that power upon the Courts, if it has not already done so. (See *ante* p. 10.)

In either event, the remoteness and uncertainty are not greater than in the cases last cited.

X.

ITEM TWENTY-THIRD.

This contains two gifts: $1,000 to the Hodgson Institute in Telfairville, Burke County, Georgia. This is clearly valid.

And $1,000 to the First Christian Church erected, or to be erected, in said village of Telfairville. The Executors are made Trustees. This gift is neither too remote nor uncertain.

Sharpley *vs.* Pillsbury, 1 Greenl, (Me.) 271.

And if the church is not now erected, the Court would hold up the fund a reasonable time. If the contingency fails to happen, the Court will apply the fund *cy pres*.

Ibid.
Attorney General *vs.* Bishop of Chester, 1 Bro. Ch. C. 444.
Attorney General *vs.* Oglander, 3 Bro. Ch. C., 166.
Ould *vs.* Washington Hospital, 5 Otto, 313.

But if this bequest was void, being a gift of money, there would be no resulting trust for the heirs at law, the fund would fall into the residium.

Wood *et al. vs.* Mitchell, Ex'tr, 32 Ga., 623.
Williams *vs.* Whittle, 50 Ga., 523.

XI.

PERPETUITIES.

ITEM TWENTY-SECOND.—This item contains the expression upon which is based the claim that the entire Will is void under the law against perpetuities. "It is my wish, and I hereby so direct, that none of the legacies, bequests and devises in any of the clauses of this my Will, shall be executed or take effect until the building and other improvements on the lot on the corner of Whitaker and Gaston Streets, and known as the Hodgson Memorial Hall, which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

The Bill states (page 3 Transcript of Record) "that the building and other improvements referred to were in the course of construction at the time of the death of testratrix, but were not completed until many months thereafter, and whether yet entirely paid for your orators are not certainly informed. If not paid for, it is the only debt known to your orators now existing against said estate.

Code of Georgia, § 2451.—"*Assets to Pay Debts:* All property, both real and personal, in this State being assets to pay debts, no devise or legacy passes the title until the assent of the Executor is given to such devise or legacy."

Code of Georgia, § 2547.—"*Duty as to Contracts:* The administrator must, as far as possible, fulfil the executory and comply with the executed contracts."

The said Twenty-Second Item is but a statement of the general law, and if stricken out, Code § § 2451 and 2547, would take its place. And should the construction contended for by appellants be placed upon these sections of the Code, no one could make a will in Georgia, valid under the law of perpetuities, who should die leaving unfinished and not entirely paid for any house, building or other improvement.

Upon the death of the testatrix, each legatee acquired such an interest in the respective legacies, that if the executors capriciously delayed payment of debts and withheld their assent, the legatee could in equity have compelled the assent.

Code of Georgia (1873), § 2452. "The assent of the executor may be presumed from his conduct, as well as his expressed consent; the executor, however, cannot, by assenting to legacies, interfere with the rights of creditors, nor can he, by capriciously withholding his assent, destroy the legacy. In equity the legatee may compel him to assent."

Executors and administrators should pay debts at the expiration of the first year from time of appointment or qualification.

Georgia Code, § § 2532--2448.

Under Code § 2451, and the twenty-second item, the executors

are trustees for the payment of debts; the intention of the testatrix clearly was to provide for the payment of debts, and that then the persons entitled should take; if anything is tied up it is the enjoyment, and not the property. The estate vests in the same manner as if the testatrix had created a term for the payment of debts. "All the authorities show that where an estate is given to trustees to pay debts, and then to a person designated, the person designated takes at once subject to the debts."

Bacon *vs.* Proctor, 1 Turner & Russell, 31, S. C. XI Condensed English Chanc. Reports, t. p. 24.

All the devises, bequests and legacies in the will are *immediate* and not *mediate*. These words were first used, and a technical meaning given to them, by Lord Hale.

Collingwood *vs.* Pace, 1 Vent., 424.

If the gift, devise or bequest is direct to the legatee or devisee without passing through another it is immediate. In this case all the gifts are directly to the legatees or devisees mentioned in the respective items of the will, or they are to William N. Habersham and William Hunter, who are nominated "as executors of this my last will and testament, and trustees under the provisions of the same."

"When a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is a trustee by necessary implication."

Nash *vs.* Cutler, 19 Pick., 71.
Bennett *vs.* Batchelor, 1 Ves., 63.
Gordon *vs.* Green, 10 Ga., 543.

The manifest intention of the testatrix is that her whole estate should pass to Hunter and Habersham as Executors and Trustees: First, To complete the building of Hodgson Memorial Hall and to pay debts—duties imposed not only by the Will but by law. Second, To assent to and turn over the legacies according to the provisions of the will.

The laws concerning limitations, remoteness and perpetuities do not apply to charities. "It is in the very nature of such charitable dispositions to withdraw the subject of them from every kind of circulation, since a contrary course defeats their manifest object, viz.: the sustentation of the charitable or religious institutions, or the carrying out in continuity of the benevolent purposes and designs, in favor of which they are made. Any disposition incompatible with this chief end is a breach of duty on the part of the person or body entrusted with the office of giving it effect, and as such is relieved against by our Courts of Equity. Land thus dedicated to the service of charity and religion is, therefore, practically inalienable."

Lewis on the Laws of Perpetuities, m., p. 689.
Vol. LII. Law Library, t. p. 438.
See also 2 Perry on Trusts, § 737, p. 360.
Wigram on Wills, pp. 401 and 406.
Tudor on Charitable Uses, p. 251.
Ould *vs.* Washington Hospital, 5 Otto, 313.
Perin *vs.* Carey, 24 How., 465.
Chamberlayne *vs.* Brockett, 8 Law Repts., Ch. 211.
Christ's Hospital *vs.* Granger, 37 Eng., Ch. 100.

The Hodgson Memorial Hall is, as the Bill and the Will show, a charity commenced by testatrix in her life time: even if the other charitable legacies and devises do not vest until the completion of this building, and the payment of the debts contracted therefor, there is no perpetuity created which the law forbids. Where property was given to one charity to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of 200 years, on the ground that it was no more a perpetuity in one charity than in the other.

2 Perry on Trusts, § 736, p. 359.
And cases cited in Note 3 on same page.
24 How., 466.

Under our Statute law a use or trust may be limited on a use or trust.

Georgia Code, (1873) § 2,315.

And "an express trust may depend for its operation upon a future event, and is then a contingent trust. It may operate in favor of additional or other beneficiaries upon specified contingencies, and is then a shifting trust."

Code of Georgia (1873) § 2311.

The appellants will doubtless rely upon the following extract from the opinion of Mr. Justice Swayne, in the case of Ould *vs.* Washington Hospital: "There may be such an interval of time possible between the gift and the consummation of the use, as will be fatal to the former. The rule of perpetuity applies to trust as well as to legal estates. The objection is as effectual in one case as in the other. If the fatal period *may* elapse before what is done *can* be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law."

The learned Justice evidently intended this only as a statement of the law relating to perpetuities, without meaning to apply it to charities, for he says, comparing the case of "The Sailor's Snug Harbor" with the case then decided: "There, as here, a future corporation was necessary to give the devise effect. There, as here, there was a possibility that such a corporation might never be created." (5 Otto, 316.) And again, on p. 313, "charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf." . . . "*Even the stern rule against perpetuities is relaxed for their benefit.*"

But even if the learned Judge intended to apply the law of perpetuities to charities, still this case is clearly not within the law against perpetuities, for the reasons already stated, and also for the following:

The Bill states that Hodgson Memorial Hall was completed before this case was brought, and within some months after Miss Telfair's death. The debt incurred in its building was either paid before the case was brought, or it was the only debt due by the estate, which was worth $650,000. (Transcript, p. 3.) The law against perpetuities is not applicable where "from the nature and internal quality of the contingency, or from express provision and restriction, it was certain that the event which was to give effect to the

limitation would happen within a life or lives in being and twenty-one years and a fraction." The contingencies here were whether the Hodgson Memorial Hall, already commenced when testatrix died, would be completed and paid for out of an estate worth $650,000; the law of Georgia, as already shown, commanding the executors to complete the building and to pay the debts within one year, and giving to each legatee the power to compel the executors to do so. From the internal qualities of these contingencies *it was certain* that these things would be done within the required time.

In Henshaw *vs.* Atkinson, Sir John Leach uses the following language:

"It is argued that it was the testator's intention that the charities were not to take effect until lands or buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and therefore that the bequest cannot be sustained. The case of Downing College Amb., 550, and Attorney General *vs.* Bishop of Chester, 1 Brown's Ch. C., 444, seem to be authority against that objection."

6 House of Lord's cases, m. p. 359.

In this case the contingencies—if any ever existed—have already happened and the intention of the testatrix expressed in clear and unambiguous terms can be carried into full effect. "It is a cardinal rule in the law that courts will do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear beyond doubt that the testator meant that no part of the property given should ever go to his heirs at law, or be applied to any object other than that to which he had devoted it by the devise here in question."

Mr. Justice Swayne in Ould vs. Washington Hospital.
5 Otto, 316.

XII.

In many of the States the Statute of 43 Eliz., Ch. 4, is not of force, and its principles have not been upheld, but the mortmain acts of Great Britain have been adopted in modified forms. Earnest attention is called to this fact, as many decisions will be cited by appellants which seemingly conflict with the principles and authorities here stated and cited, but which, on examination, will be found to rest on laws at variance with the Statutes of the Georgia Legislature and the decisions of Georgia courts.

XIII.

It was claimed in the Circuit Court that the twelfth, thirteenth and twenty-first items of the Will are inoperative, because the charities are to the poor of Chatham County, and that two of the witnesses to the Will are taxed to support them.

The assignments of error in the record do not raise this question here.

See Transcript, p. 30.

The point was not well taken; the poor entitled to the charity are not the poor who would be supported by the taxes.

2 Perry on Trusts, § 698.

And this point is *res adjudicata.*

Wetter *et al.* vs. Habersham *et al.*, 60 Ga., 202.

XIV.

It was also claimed in the court below that the tenth, eleventh and fourteenth items are inoperative, because two of the witnesses to the Will were pew-holders, subscribers to, and members of, the corporations. The assignments of error make no allusion to this point, probably because it has frequently been decided that this objection is not good.

Cornwell vs. 1 Day (Coun.) 35.
Eustis vs. Parker, 1 N. H., 273.
Warren vs. Baxter, 48 Minn., 193.
Loring vs. Park, 7 Gray, 42.

This point is also *res adjudicata.*

Wetter *et al.* vs Habersham *et al.*, 60 Ga., 202.

Acts of the General Assembly of Georgia referring to the Independent Presbyterian Church.

Act assented to December 8th, 1806, entitled,

"AN ACT

To incorporate the Presbyterian Church of the city of Savannah."

Section 1. Declares certain persons and their successors to be a body corporate by the name and style of the Trustees of the Presbyterian Church of the city of Savannah.

Section 2. "*And be it further enacted,* That the said Trustees and their successors in office, shall be invested with all manner of property, real and personal, all monies due and to grow due, donations, gifts, grants, privileges and immunities whatsoever, which shall, or may, belong to said Presbyterian Church, at the time of the passing of this act, or which shall or may at any time or times hereafter be granted, given, conveyed or transferred to them, or their successors in office, to have and to hold the same to the said Trustees, and their successors in office, to the only proper use, benefit and behoof of the said Church forever. And the said Trustees and their successors in office may have and use a common seal, and shall be, and they are hereby declared to be capable, by the name and style aforesaid, of suing and being sued, impleading and being impleaded, in any Court or Courts of law or equity, and of using and taking all lawful and necessary ways and means for recovering or defending any property whatever, which the said Church may have, hold, claim or demand, or the rents, issues and profits thereof, or of any part thereof."

Section 3. Concerning election of Trustees.

Section 4. "*And be it further enacted,* That nothing herein contained shall be construed to vest in the said Trustees any right or title to any estate or property whatsoever, real or personal, other than such as doth, or may rightfully and lawfully, belong to the said Presbyterian Church, or congregation, hereby made a body corporate."

Section 5. "*And be it further enacted,* That it shall not be lawful for said Trustees or their successors in office at any time or times, hereafter, to grant, bargain, sell, alien or convey any real estate whatsoever, belonging to the said Church, to any person or persons, under any pretense, or upon any consideration whatsoever so as to dispose of the fee simple thereof."

Section 6. Repeals former law, &c.

(See Georgia Laws for year 1806, pp. 40 & 41).

Act assented to 27th November, 1807, entitled,

"AN ACT

To amend an Act entitled, 'An Act to incorporate the Presbyterian Church of the City of Savannah."

Section 1. Concerning election of Trustees.

See Transcript, p. 30.

Section 2. "*And be it further enacted*, That the said Trustees, and their successors in office, shall be invested with all manner of property, real and personal, monies, rights and immunities whatsoever, belonging to the said Presbyterian Church, and shall have, use and exercise the same powers as given and vested in the Trustees named and appointed in said act in as full and ample manner as the said Trustees, at this time of passing this act, are invested therewith, under and by virtue of the act aforesaid."

(See Georgia Laws for year 1807, pp. 100 & 101.)

Act assented to 16th May, 1821, entitled,

"AN ACT

To empower the Trustees of the Independent Presbyterian Church of Savannah to sell the real estate belonging to the same, and to amend an Act entitled, An Act to amend an Act to incorporate the Presbyterian Church of the City of Savannah."

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same*, That the body corporate created, and the Trustees appointed under and by virtue of the aforesaid acts, shall be entitled and styled "The Trustees of the Independent Presbyterian Church of Savannah." And all acts done, and all deeds, testaments, gifts, grants, conveyances and contracts, which have been, or shall be made, executed or entered into by, with or to them, under or by the said name or style, or any other name or style, which shall describe the said corporation or church, or efficiently to ascertain the intention of the parties, shall be as good and valid in law as if the said corporation had been correctly described therein.

Section 2. *And be it further enacted by the authority aforesaid*, That the said Trustees be, and they are hereby authorized and empowered to sell and dispose, in fee simple or otherwise, of any real estate belonging to the said church or corporation, the half tything whereon the new Presbyterian Church, or meeting house, is situate excepted, for the purpose of paying the debts now due and owing by the said corporation.

Section 3. *And be it further enacted*, That all laws and parts of laws militating with this act be, and they are hereby repealed.

See Georgia laws for year 1821, p. p. 29 and 30.

WIDOW'S SOCIETY.

"AN ACT to incorporate the Widow's Society, for the relief of indigent widows and orphans in the City of Savannah."

"Section 1. *Be it enacted*," *&c.*, "That" certain persons named and all others who may become members "be, and they are hereby, incorporated and made a body politic, by the name and style of the Savannah Widow's Society, for the relief of indigent widows and orphans, with the privilege of using a common seal."

"Section 2. *And be it further enacted by the authority aforesaid,* That the said Society, by the name and style aforesaid, shall be, and they are hereby, made able and capable in law to hold, purchase, receive, and enjoy lands and tenements, goods and chattels, and effects of what kind and nature soever, and the same to give, grant, alien and dispose of, to sue and be sued, to plead and be impleaded, in courts of record, and also to ordain and put in execution such by-laws and regulations as shall seem necessary and convenient for the general government of said corporation, Provided, such by-laws and regulations are not contrary to the laws and Constitution of this State or of the United States."

UNION SOCIETY.

AN ACT for incorporating the Union Society in Savannah, A. D. 1786.

Whereas, William Stephens, President; Leonard Cecil, Vice President; David Montaigut, Secretary; James Bulloch and George B. Spencer, Stewards; Mordecai Sheftall, Oliver Bowen, John Morell, Peter Deveaux, James Habersham, Joseph Habersham, Joseph Clay, Frederick Herb, John Richards, Benjamin Lloyd, James Fields, John Wandin, James Milledge, Samuel Stirk, Raymond Demerie and George Handley have, by their petition, represented that they are members of the Union Society, in the town of Savannah, in this State; and that the said Society has established a fund, which is increasing, for the relief of distressed widows, and the schooling and maintaining poor children, many of whom have and others are at present receiving assistance from the said Society, and therefore pray to be incorporated. And as the allegations of the said petition are verified, therefore, for promoting and encouraging societies founded on benevolent principles: *Be it enacted by the Representatives of the freemen of the State of Georgia, in General Assembly met, and by the authority of the same,* That the several persons above named, and who are now and shall hereafter be members of the Union Society in Savannah, respectively, and the successors, officers and members of the same shall be, and they are hereby, declared to be a body corporate, in deed and in name, by the name and style of the President and Vice President of the Union Society in Savannah, and by the said name shall have perpetual succession of officers and members, and a common seal to use, with power to make, alter, change and amend such by-laws and regulations as may be agreed on by the members of the said Society; Provided, such laws be not repugnant to the Constitution and laws of this State. And that they have privilege to sue for and recover all monies that now are or may be due the said Union Society by any name or in any manner of wise howsoever, and the rights and privileges of the said Society in any Court to defend, and to receive, take and apply all or any donations for the uses intended by the said Society, and shall, and hereby are, declared to be vested with all the privileges, powers and advantages, rights and immunities of a society of people incorporated for the purposes intended by their institution.

See Transcript, p. 00.

II. *And be it further enacted*, That this act shall be deemed and taken as a public act to all intents and purposes whatsoever.

Approved August 14th, 1786.

GEORGIA HISTORICAL SOCIETY.

AN ACT to incorporate the Georgia Historical Society.

Whereas, The members of a Society instituted in the City of Savannah, for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular, and of American history generally, have applied for an act of incorporation.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same*, That [certain persons named] and such other persons as now are, and may from time to time, become members of said Society, be, and they are hereby declared and constituted a body corporate and politic, by the name of the "Georgia Historical Society," and by that name shall have perpetual succession, and be capable to sue and to be sued, to plead and be impleaded, answer and be answered unto, defend and be defended in all courts or places whatsoever, to have a common seal, and the same at pleasure to change or alter; to make, establish and ordain such a constitution and such by-laws, not repugnant to the constitution of this State, or the United States, as shall from time to time be necessary and expedient, and to annex to the breach thereof such penalty, by fine, suspension, or expulsion, as they may deem fit, and to purchase, take, receive, hold and enjoy, to them and their successors, any goods and chattels, land and tenements, and to sell, lease, or otherwise dispose of the same, or any part thereof, at their will and pleasure; provided, that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars, and provided, also, that the funds of the said corporation shall be used and appropriated to the purposes stated in the preamble of this act, and those only.

Section 2. *And be it further enacted by the authority aforesaid*, That the said Society shall have power to elect and qualify such officers as may by them be deemed necessary, to be chosen at such time, and to hold their office for such period, as the constitution or by-laws of said Society shall prescribe; and that if the election of said officers, or any of them, shall not be held on any of the days for that purpose appointed, it shall be lawful to make such election on any other day.

Section 3. *And be it further enacted by the authority aforesaid*, That it shall be the duty of the Governor of the State to transmit or cause to be transmitted to the said Society a set of the acts and also of the journals of the present and future sessions of the Legislature, and also copies of all other documents, papers, books, and pamphlets that shall hereafter be printed under or by virtue of an

act of Legislature, or joint resolution of both branches thereof, unless such act or resolution shall otherwise provide, and that the said Society may, by their agent or agents, have access at all reasonable times to the several public offices of this State, and of the corporate towns and cities thereof, and may cause such documents to be searched, examined and copied without paying office fees, as they may judge proper, to promote the object of the Society.

Section 4. *And be it further enacted*, That this act shall be, and is hereby, declared to be a public act, and shall be construed benignly and favorably for every beneficial purpose therein intended, and that no misnomer of the said corporation in any deed, will, testament, devise, gift, grant, demise, or other instrument of contract or conveyance, shall vitiate or defeat the same, provided the corporation shall be sufficiently described to ascertain the intention of the parties.

Section 5. *And be it further enacted*, That the Governor be, and he is hereby, authorized and requested to confide to the care and keeping of the proper officers of said Society the transcripts of the Colonial records lately taken by the Rev. C. M. Howard in London, until further disposition of the same shall be made by the General Assembly.

Assented to December 19th, 1839.

AN ACT

To amend an Act entitled "An Act to incorporate the 'Georgia Historical Society,'" assented to 19th December, 1839.

Section 1. *The General Assembly of the State of Georgia do hereby enact*, That the provisos in the first section of the Act entitled "An Act to incorporate the 'Georgia Historical Society," assented to on the nineteenth day of December, in the year eighteen hundred and thirty-nine, be and the same are hereby repealed.

Section 2. *And be it hereby further enacted*, That this Act take effect immediately on its passage; and that all Acts and parts of Acts, so far as they militate with this act, are hereby repealed.

Approved October 25th, 1870.

A. R. Lawton
W. G. Mann
R. S. Chisholm
E. C. Jones
Commissioners

17-174

OFFICE SUPREME COURT U.S.
FILED
NOV 2 1882
JAMES H. MCKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1882.

No. 82.

WALLACE S. JONES AND NOBLE JONES, EXECUTORS OF GEORGE NOBLE JONES, AND OTHERS,

Vs.

WILLIAM N. HABERSHAM AND WILLIAM HUNTER, EXECUTORS OF MARY TELFAIR, THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA, AND OTHERS.

BRIEF OF

CHARLES C. JONES, JR.,

OF COUNSEL FOR THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA, ONE OF THE DEFENDANTS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1882.

No 82.

WALLACE S. JONES and NOBLE JONES, Executors of GEORGE NOBLE JONES, and others.
vs.
WILLIAM N. HABERSHAM and WILLIAM HUNTER, Executors of Mary Telfair, the Presbyterian Church of the City of Augusta, and others.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

The present appeal is entered from a decision of his honor, Mr. Justice Bradley, rendered in the Circuit Court of the United States for the Southern District of Georgia, at Savannah, on the 5th of June, 1879, sustaining the demurrer interposed by the Defendants, and dismissing with costs the bill of the complainants.

Transcript of Record, fol. 71, et seq.

In behalf of the Presbyterian Church of the City of Augusta, one of the Defendants, the following brief is submitted in support of the decree of his honor, Mr. Justice Bradley.

I.

The contest arises between the heirs at law of Miss Mary Telfair, and the legatees and devisees under her last will and testament. That will was made on the first day of June, 1875.

Transcript of Record, folios 22-39.

The testatrix died on the following day.

Transcript of Record, fol. 4.

The probate of this will was strenuously contested on various grounds, but it was finally and fully established on appeal by the Supreme Court of Georgia, the Court of last resort.

Jones et al. vs. Habersham, et al., 63 Ga. R., 146.

The testatrix never married. She died at an advanced age, and left no relations except collaterals in the third and fourth degrees. In accordance with the provisions of her will her large estate was to be distributed mainly in charities.

In commenting upon this will, the Supreme Court of Georgia [63rd Georgia Reports, p. 157] say: "The testamentary scheme contained in the will, displays, on the part of the testatrix, a broad philanthropy, great knowledge of the society and times in which she lived, deep foresight in choosing the objects of her bounty, and the measures for its faithful and

enduring application ;—in fact, unmistakably the product of a well-ordered and strong mind. It would be hard to find a will in which so large an estate, [over $600,000], is bestowed to various objects of culture, charity, and religion, personal regard, and kinship, though remote and collateral, and in which will and every clause of it *judgment* is more apparent."

Such is the impression made upon the mind of the Court of last resort in Georgia when passing upon and sustaining this will.

So far as the Courts of Georgia are concerned, the validity of this will, in all its provisions, is *res adjudicata.*

II

The legacy to the Presbyterian Church of the City of Augusta is contained in the 17th item of the will of Miss Telfair, which reads as follows:

"I hereby give, devise, and bequeath to the Presbyterian Church of the City of Augusta, which has its church edifice on Telfair street in that city, or to the Trustees thereof, and its or their successors, the sum of thirty thousand dollars in United States currency, to be appropriated to and expended in the building and erection of a suitable and commodious Sunday school house and library on a portion of said lot fronting on Telfair street. And I hereby request and direct my executors to pay over said sum of thirty thousand dollars from funds in the hands of Baring Brothers and Company of London, which funds are to be by them withdrawn after my death."

Transcript of Record, fol. 32.

No legacy can be more specific or immediate in its terms. The recipient of the charity is clearly pointed ont. The sum given is money in hand, to the credit of Testatrix with her bankers, Messrs. Baring Brothers & Company, The object of this charity is designated. Payment is enjoined upon her executors. About tne entire matter there lingers no shadow of doubt, no savor of uncertainty.

Nor is there any suggestion on the part of the Appellants that this legatee is incapable of receiving and administering this charitable gift.

As a matter of fact, since the date of its incorporation by act of the Legislature of Georgia on the 18th of February, 1796, this church has been in active existence and capable of "acquiring, having, holding, and enjoying real and personal property for its use and benefit."

It may properly be classed among the most venerable and useful religious societies in Georgia.

Marbury & Crawford's Digest, p. 135.
Clayton's Digest, p. 464.
Georgia Session Laws of 1836, p. 78.
Georgia Session Laws of 1850, p. 81.
Georgia Session Laws of 1859, p. 113.
Georgia Session Laws of 1870, p. 387.
Georgia Session Laws of 1876, p. 261

By its act of incorporation, and by the acts of the General Assembly of the State of Georgia supplementary thereto, this church is empowered "to take, control, and hold all property, real and personal, which it may acquire by gift, grant, purchase, devise, or in any other way."

Aside from these powers with which it is thus specifically invested by its act of incorporation and by the other acts of the Legislature to which reference has been made, this church, in its corporate capacity and through its trustees, under and by virtue of the general laws of Georgia, is capable of taking and administering this legacy of $30,000.

The Code of Georgia [§ 2347] provides that all incorporated churches and religious societies "in their distinct and proper names, by their trustees or officers, shall be entitled and authorized to receive by purchase, gift, or bequest, all property, both personal and real."

By section 3157 of that Code, "every educational purpose," "provisions for religious instruction or worship," and "subjects having for their object the relief of human suffering or the promotion of human civilization," are declared to be proper and laudable matters for the exercise of charity.

In section 2468 of that Code it is broadly asserted that "a devise or bequest to a charitable use will be sustained and carried out in this State."

The Courts of Georgia have, with great alacrity and in the fullest manner, upheld and given effect to these provisions of the Code.

Newson vs. Starke, 46 Georgia, 88.

Cumming et al. vs. Trustees of the Reid Memorial Church, 64th Georgia, 105.

By virtue, therefore, not only of its act of incorporation, and the powers conferred by special legislation, but also in pursuance of the general laws of Georgia, the Presbyterian Church of the City of Augusta is entirely capable of receiving and administering this legacy.

III.

The suggestion of the Appellants is that as the Testatrix by the twenty-second item of her will wishes and directs that "none of the legacies, bequests, and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate," such postponement of the execution and effect of those devises, legacies, and bequests, violates the rule against perpetuities and renders them inoperative and void.

Transcript of the Record, fols. 5, 8, 37.

It is admitted in the bill that the building and other improvements referred to were in process of construction at the time of the death of the Testatrix, and that they were completed some months thereafter Upon the point whether they have yet been entirely paid for, the complainants profess no certain information. If not paid for, they assert this to be the only debt due by the estate, known to the complainants.

Transcript of the Record, fol. 8.

Observe : it did come to the knowledge of the Appellants that this building and the other improvements on the lot on the corner of Gaston and Whitaker streets had been completed prior to the time of the filing of this bill. Nearly four years elapsed after the death of the Testatrix before this bill was exhibited.

enduring application ;—in fact, unmistakably the product of a well-ordered and strong mind. It would be hard to find a will in which so large an estate, [over $600,000], is bestowed to various objects of culture, charity, and religion, personal regard, and kinship, though remote and collateral, and in which will and every clause of it *judgment* is more apparent."

Such is the impression made upon the mind of the Court of last resort in Georgia when passing upon and sustaining this will.

So far as the Courts of Georgia are concerned, the validity of this will, in all its provisions, is *res adjudicata.*

II

The legacy to the Presbyterian Church of the City of Augusta is contained in the 17th item of the will of Miss Telfair, which reads as follows:

"I hereby give, devise, and bequeath to the Presbyterian Church of the City of Augusta, which has its church edifice on Telfair street in that city, or to the Trustees thereof, and its or their successors, the sum of thirty thousand dollars in United States currency, to be appropriated to and expended in the building and erection of a suitable and commodious Sunday school house and library on a portion of said lot fronting on Telfair street. And I hereby request and direct my executors to pay over said sum of thirty thousand dollars from funds in the hands of Baring Brothers and Company of London, which funds are to be by them withdrawn after my death."

Transcript of Record, fol. 32.

No legacy can be more specific or immediate in its terms. The recipient of the charity is clearly pointed ont. The sum given is money in hand, to the credit of Testatrix with her bankers, Messrs. Baring Brothers & Company, The object of this charity is designated. Payment is enjoined upon her executors. About the entire matter there lingers no shadow of doubt, no savor of uncertainty.

Nor is there any suggestion on the part of the Appellants that this legatee is incapable of receiving and administering this charitable gift.

As a matter of fact, since the date of its incorporation by act of the Legislature of Georgia on the 18th of February, 1796, this church has been in active existence and capable of "acquiring, having, holding, and enjoying real and personal property for its use and benefit."

It may properly be classed among the most venerable and useful religious societies in Georgia.

Marbury & Crawford's Digest, p. 135.
Clayton's Digest, p. 464.
Georgia Session Laws of 1836, p. 78.
Georgia Session Laws of 1850, p. 81.
Georgia Session Laws of 1859, p. 113.
Georgia Session Laws of 1870, p. 387.
Georgia Session Laws of 1876, p. 261

By its act of incorporation, and by the acts of the General Assembly of the State of Georgia supplementary thereto, this church is empowered "to take, control, and hold all property, real and personal, which it may acquire by gift, grant, purchase, devise, or in any other way."

Aside from these powers with which it is thus specifically invested by its act of incorporation and by the other acts of the Legislature to which reference has been made, this church, in its corporate capacity and through its trustees, under and by virtue of the general laws of Georgia, is capable of taking and administering this legacy of $30,000.

The Code of Georgia [§ 2347] provides that all incorporated churches and religious societies "in their distinct and proper names, by their trustees or officers, shall be entitled and authorized to receive by purchase, gift, or bequest, all property, both personal and real."

By section 3157 of that Code, "every educational purpose," "provisions for religious instruction or worship," and "subjects having for their object the relief of human suffering or the promotion of human civilization," are declared to be proper and laudable matters for the exercise of charity.

In section 2468 of that Code it is broadly asserted that "a devise or bequest to a charitable use will be sustained and carried out in this State."

The Courts of Georgia have, with great alacrity and in the fullest manner, upheld and given effect to these provisions of the Code.

Newson vs. Starke, 46 Georgia, 88.

Cumming et al. vs. Trustees of the Reid Memorial Church, 64th Georgia, 105.

By virtue, therefore, not only of its act of incorporation, and the powers conferred by special legislation, but also in pursuance of the general laws of Georgia, the Presbyterian Church of the City of Augusta is entirely capable of receiving and administering this legacy.

III.

The suggestion of the Appellants is that as the Testatrix by the twenty-second item of her will wishes and directs that "none of the legacies, bequests, and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate," such postponement of the execution and effect of those devises, legacies, and bequests, violates the rule against perpetuities and renders them inoperative and void.

Transcript of the Record, fols. 5, 8, 37.

It is admitted in the bill that the building and other improvements referred to were in process of construction at the time of the death of the Testatrix, and that they were completed some months thereafter Upon the point whether they have yet been entirely paid for, the complainants profess no certain information. If not paid for, they assert this to be the only debt due by the estate, known to the complainants.

Transcript of the Record, fol. 8.

Observe : it did come to the knowledge of the Appellants that this building and the other improvements on the lot on the corner of Gaston and Whitaker streets had been completed prior to the time of the filing of this bill. Nearly four years elapsed after the death of the Testatrix before this bill was exhibited.

Transcript of the Record, folios 4 and 51.

Complainants do not positively charge that "Hodgson Memorial Hall" and appurtenances have not been fully paid for. They only profess a lack of certain knowledge on the subject.

Upon such a shadowy basis rests the suggestion of a violation of the law against perpetuities.

Now is there anything in this condition of affairs which prevents the vesting or the execution of this bequest within the period allowed by law?

The gift is in terms, certain, immediate, and absolute. It is clear, beyond doubt, that the Testatrix meant that no part of the sum, thus bequeathed, should ever go to her heirs at law, or that it should be applied to any object other than that to which she had devoted it by the legacy in question.

Ould vs. Washington Hospital, 95 U. S. R., 303.

It is an admitted principle that Courts will, if practicable, so construe the language of a will as to favor and facilitate the vesting of the devises and legacies created by it.

The present legacy vested, although the beneficial use and enjoyment of it may have been temporarily postponed or suspended until the completion of and payment for Hodgson Hall—a building nearly finished at the death of the Testatrix. For the payment of any sum connected with its erection, the estate of the Testatrix was abundantly able to respond. Her executors were enjoined to attend promptly to such completion and payment. Her anxiety manifestly was to compass such completion and payment at the earliest moment; and hence the temporary delay in the distribution of her estate.

See2 Redfield on Wills, *235, 236.

The enjoyment of this legacy was merely postponed until this debt, due by her estate, could be discharged by her executors. The suspension of its payment was in usual course and for the accommodation of the estate. Manifestly the completion of Hodgson Hall, and full payment for its construction and equipment, lay very near the heart of the Testatrix, who had given to this matter her personal thought and direction.

The intention of the Testatrix in the 21st item of her will was not, we respectfully suggest, to suspend the vesting of this legacy or to render it in any sense uncertain, but to stimulate her executors to the prompt discharge of a duty sanctioned by law, and by the Testatrix regarded as most important. To invest them with the largest and most permanent powers, her executors are also constituted trustees to carry out the provisions of her will.

Transcript of Record, fol. 38.

Were it uncertain within what period Hodgson Hall would be completed and paid for, the Court would treat the legacy as vested and hold up the fund for a reasonable time until it should be certified that the will of the Testatrix had been fully carried out.

Attorney-General vs. Bishop of Chester. 1 Br. Ch. R., 444.

As a matter of fact, Hodgson Hall and appurtenances were fully completed and paid for shortly after the death of the Testatrix, and long before the present bill was exhibited.

This legacy would have been paid over by the executors but for the assaults made upon the will by complainants in the Georgia Courts, and subsequently in the United States Court.

It will be observed that this gift is of money, and that the recipient is a corporation capable of indefinite succession, and exempt from the ordinary casualties of human life.

Were the time of the completion of and payment for Hodgson Hall still uncertain, the Court would, at the worst, regard the legacy as *debitum in presenti, solvendum in futuro.*

2 Redfield on Wills, * 238, 239.

If doubt existed whether the words of condition or postponement applied to the gift itself or to the time of payment, the Court would construe them rather as applying to the time of payment, and would hold the gift to be vested and not contingent.

Eldridge vs. Eldridge, 9 Cushing, 516.

2 Redfield on Wills, * 248 et seq, where the leading cases are reviewed.

The law favors the vesting of legacies, and if the question of futurity appears to relate to the time of payment only, such for example, as that they shall be postponed until the testator's debts are satisfied, or his assets realized, or an outstanding security be called in, or until certain real estate be sold, or money directed by the will to be laid out in the purchase of land is so laid out, the legacies vest instanter.

1 Jarman on Wills, * 779, 837, 838. 5th Amer. Ed.

The rule as to perpetuities deals with the *vesting of the title, and not with the actual reception of the profits of the estate.*

Loring vs. Blake, 98 Mass., 253.

Perry on Trusts, § 381, and cases cited.

If two constructions may be put upon a will, one of which will offend against the rule against perpetuities, and the other not, the construction which will not offend against the rule will be adopted, if in other respects it can be sustained.

Perry on Trusts, § 381, and cases cited.

Charities are exempt from the operation of the general law as to perpetuities. Against God and religion there is no limitation.

Perry on Trusts, § 736.

Charities are so highly favored that they have always received a construction more liberal than that allowed in the case of gifts to individuals.

Story's Eq. Jur., §§ 1165, 1169, 1154, b, c, d.
Tiffany & Bullard on Trusts, 241.
Perry on Trusts, §§ 687, 688, 697, 709.
Beall vs. Fox, 4th Georgia R., 404.
Code of Georgia, § 2468.

It is the duty of the Courts, so far as the rules of law will allow, to give effect to the intention of the Testatrix as disclosed by and deduced from the language of the entire will interpreted in the light of the circumstances which surrounded her at the time of its execution. It is the intent which guides the use.

The construction of a will depends upon the intention of the Testatrix to be ascertained from a *full view of everything contained within the four corners of the instrument,* and collected *ex visceribus testamenti.*

1 Redfield on Wills, * 435, 433, 434, 442, 464.
Tiffany & Bullard on Trusts, 26, 44, 244, 247, 251.
Perry on Trusts, §§ 723-727, 158, 249, 723, 727.
Code of Georgia, § 2456.
Felton vs. Hill, 41 Georgia R., 554, 569.
Red vs. Hargroves, 40 Georgia R., 18, 25.
Robert vs. West, 15 Georgia R., 122, 141.
Cook vs. Weaver, 12 Georgia R., 47, 49, 50.
Beall vs. Fox, 4 Georgia R., 404, 427.

Cumming vs. Trustees of Reid Memorial Church.
64 Georgia R., 105.

In the construction of wills it is a cardinal rule that the Court will prefer an interpretation which prevents a partial intestacy to one which will permit it.

2 Redfield on Wills, * 116, and cases cited.
Roper on Legacies, * 1464.
2 Powell on Devises, * 8.
Jarman on Wills, * 851—note.
Vernon vs. Vernon, 53 New York R., 351, 361.
Givin vs. Hilton, 95 U. S. Rep., 591, 594.
Newson vs. Starke, 46 Georgia R., 88.

If practicable, Courts will place that construction upon a will which will effectuate the contemplated disposition of property, and thus support the charitable bequest.

Perry on Trusts, § 709.
DuBois vs. Ray, 35 New York, 162.
Post vs. Hover, 33 New York, 593.

IV.

By the laws of Georgia all property, both real and personal, being assets in the hands of the executor to pay debts, no devise or legacy passes the title until the assent of the executor be given.

Code of Georgia, § 2451.
Reese on Executors, &c., 277.
2 Williams on Executors, §1175 et seq.

Where the estate suffices, the payment of the debts of testator is the first duty of the executor. Until those debts are accommodated, he gives no assent to legacies and devises.

The completion of Hodgson Hall and payment therefor being an obligation incurred by Testatrix during life, and resting upon her estate, in the execution of her will, even in the absence of the injunction contained in item 22d, it was the duty of the executors to discharge and fulfill this outstanding obligation before distributing the estate in accordance with the provisions of that will.

The effect of the 22d item of this will is simply to remind the executors, and to enjoin prompt observance by them, of an obligation devolved by law—a duty which, in any event, and in the absence of this item, they would be compelled to perform.

The suggestion that there is any violation of the law against perpetuities is utterly without foundation.

We cannot better conclude what we have to submit upon this branch of the case than by quoting from the exhaustive and able decision of Mr. Justice Bradley at Circuit bearing upon this special point:

"In considering this objection to the validity of the dispositions of the will, it is to be observed in the first place that all the gifts therein contained are immediate in form. * * It seems to us, therefore, that the gift itself is not suspended upon the completion of the Hodgson Memorial Hall and the payment thereof; but only the execution and carrying into

effect thereof. Some of the gifts are pecuniary legacies. If this view is correct, the gift of these legacies is not suspended, but only the payment thereof. This seems to us to be the intent of the Testatrix. No one can read the whole will and believe that the Testatrix for one moment had in her mind the revocation or non-operation of the gifts themselves. The Memorial Hall was begun at the time the will was executed, and was so far constructed as to be completed within a few months afterwards. Its plan and extent must have been designed, and its cost must, within probable limits, have been anticipated. It was her desire that the executors and trustees should finish the building and pay for it before the other legacies should be paid, or the other donations carried into effect. If any unreasonable delay should occur in this behalf, of course it would be competent for any of the beneficiaries under the will to compel the trustees to proceed. But it being an obligation of her estate, incurred under her own directions, she wished it discharged before the other donations of her will should be carried out, and she is, therefore, emphatic on the subject.

There is reason in what the counsel for the defendants say that this provision is in effect what the law of Georgia requires or allows in all cases. Section 2451 of the Code declares that "all property, real and personal, in this State being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." In other words, the payment of debts and the fulfilment of obligations are the first things to be executed before the devises and bequests can be carried out without the assent of the executors. The completion of this Memorial Hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require in all cases."

V.

Another suggestion of the Appellants is that this, and the other legacies and devises contained in the will of Miss Telfair, are void because the Testatrix, who bequeathed such a large portion of her estate to charitable uses, died within ninety days after the execution of her will.

The law of Georgia on this subject is as follows- "No person leaving a wife or child or descendants of child shall, by will, devise more than one-third of his estate to any charitable, religious, educational, or civil institution to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.

Code of Georgia, § 2419.

This section of the Code received definite interpretation at the mouth of the Supreme Court of Georgia, in the case of Reynolds vs. Bristow, 37th Georgia Reps., 283; and the decision of the Court, as announced by Chief Justice Warner, is that "the restriction contained in this section of the Revised Code applies only to such testators as die leaving a wife or child, or descendants of a child."

Miss Telfair having never married, and leaving neither child nor descendant of child, the suggestion of the complainants is in no manner pertinent.

VI.

The intimations in the bill that there has been an attempt on the part of the Testatrix to confer ultra vires powers upon some of the devisees, that conditions illegal and uncertain have been attached to other bequests, that effort has been made to convey large portions of her property upon indefinite charities without the intervention of trustees capable of taking, and that some of the devises are restricted by unlawful reservations, are without warrant of law, and are wholly inapplicable to the bequest contained in the 17th item of this will.

VII.

The objections raised against the competency of two of the witnesses to the will were not urged against, and were not applicable to, this legacy to the Presbyterian Church of the City of Augusta. Had they been pertinent, they were not pressed in the Court below. They were emphatically overruled by the Supreme Court of Georgia in the case of Jones et al. vs Habersham, et al. 63rd Georgia R., 146.

In the eloquent language of his honor, Mr. Justice Bradley, in delivering his opinion in this case in the Court below, "It is a laudable ambition to wish to transmit one's name to posterity by deeds of benficence. The millionaire who leaves the world without doing anything for the benefit of society or for the advancement of science, morality, or civilization, turns to dust and is forgotten; but he who employs a princely fortune in founding institutions for the alleviation of suffering, or the elevation of his race, erects a monument more noble, and generally more effectual to preserve his name, than the pyramids. Thousands of the wealthy and the noble in the early days of English civilization are deservedly forgotten, but the founders of colleges in Oxford and Cambridge will be borne on the grateful memories of Englishmen as long as their empire lasts. Harvard and Yale in our own country are pertinent examples of this truth. * * In our judgment, the gifts of this will must be sustained."

In the history of wills Georgia has never known charitable bequests of such magnitude and of such liberal scope. They stand apart, and whole communities yearn for the advent of the time when, this litigation ended, they may enjoy the benign and far-reaching benefits which will flow from their judicious and enduring administration. Art, science, religion, the orphan, the widow, the sick and indigent female, with united voice and confident entreaty pray your Honors by final decree to sustain the provisions of this most beneficent will. Respectfully submitted,

CHARLES C. JONES, JR.,

of Counsel for the Presbyterian Church of the City of Augusta, one of the Defendants.